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ABSTRACT

This first chapter of "The Yearbook of School Law, 1986" summarizes and analyzes over 250 state and federal court decisions handed down in 1985 affecting the legal rights of employees of public schools and state education agencies. Among the topics examined are discrimination on the basis of race, religion, sex, national origin, age, and handicap; employees' constitutional rights to feeedom of speech, association, religion, and privacy and substantive due process; and employees' procedural due process rights related to liberty and property interests, the provision of notice of charges, and appropriate hearings. Other topics addressed are permissible personnel actions in cases involving claims of insubordination, unprofessional conduct, immorality, incompetence, and failure to comply with policies and statutes; legal questions raised by reductions in force and involuntary leaves of absence; contractual disputes over board policies, contract stipulations, administrative regulations, and statutory provisions; matters of tenure including tenure by default or by acquiescence; and requirements related to certification. Cases focusing on salaries, employment benefits, criminal acts, torts, collective bargaining, or purely procedural issues are not covered or are dealt with in other chapters of the yearbook. (PGD)

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INTRODUCTION

This chapter reviews over 250 judicial decisions reported in 1985 concerning the legal rights of precollegiate, public-sector education employees. Cases dealing with salary and similar employment and unemployment benefits, criminal cases, and cases focusing on purely procedural issues have been omitted. Tort cases involving employees and those dealing with collective bargaining are found in other chapters of the *Yearbook*.

DISCRIMINATION IN EMPLOYMENT

Employment discrimination cases can be judicially reviewed pursuant to the equal protection clause of the United States Constitution, similar state constitutional provisions, or a variety of federal and state civil rights provisions. Most employment discrimination cases, however, are brought under title VII of the Civil Rights Act of 1964,[1] which prohibits employment discrimination because of a person's race, color, religion, sex, or national origin. Discrimination on the basis of age, for those individuals between the ages of forty and seventy, is prohibited by the federal Age Discrimination in Employment Act of 1975 (ADEA),[2] and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.[3]

Of the two types of title VII cases, those alleging discriminatory treatment are more common than those alleging that some action or policy, although neutral on its face, has a discriminatory impact on a protected class of individuals. In order to prove discrimination, a plaintiff must first demonstrate a *prima facie* case of discrimination: that the plaintiff was burdened because of race, color, religion, sex, or national origin, or that some policy or practice burdens persons of the plaintiff's class. The employer then must "articulate some legitimate,

1. 42 U.S.C. § 2000 *et seq.*
2. 42 U.S.C. § 1601 *et seq.*
3. 29 U.S.C. § 794 *et seq.*

nondiscriminatory reason" for the employee's treatment[4] or must demonstrate by clear and convincing evidence the job-relatedness of the practice or policy that has a discriminatory impact on a class of individuals.[5] If the employer is successful, the employee still has an opportunity to rebut the employer's contention and prove by a preponderance of the evidence that discrimination is the motive (in discriminatory treatment cases) or the effect (in discriminatory impact cases).

Race

The Seventh Circuit has said that, when alleging race discrimination, public employees have a choice between bringing the case under title VII, with its requirement of the exhaustion of administrative remedies, or the equal protection clause. Where the facts of the case would indicate a violation of title VII, the employee nevertheless has an independent right to be free of discrimination under the Constitution.[6] Another case illustrating the flexibility of procedural remedies for alleged race discrimination arose under section 1981 of the Civil Rights Act of 1866,[7] which prohibits both public and private discrimination in the making of contracts. Where a black female teaching assistant alleged discrimination arising out of the failure to promote her to the position of teacher, the court applied the same principles regarding the order of presentation of evidence and burden of proof as are applicable in title VII discriminatory treatment cases.[8] Under either statute, the plaintiff must prove by a preponderance of the evidence that the defendant was guilty of intentional discrimination on the basis of race.

Although failure to make out a *prima facie* case of racial discrimination is rare in reported cases, where a qualified white male applied and was rejected for a position as teacher-director of a day care center (in favor of a qualified black female), the court held that the circumstances did not suggest unlawful discrimination.[9] Citing the Supreme Court case of *Texas Department of Community Affairs v. Burdine*,[10]

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4. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
5. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
6. Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985).
7. 42 U.S.C. § 1981.
8. Love v. Special School Dist., 606 F. Supp. 1320 (E.D. Mo. 1985) (plaintiff's ultimate burden under section 1981, as in a title VII discriminatory treatment case, is to prove intentional discrimination). For applicable standards, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
9. Farrell Area School Dist. v. Deiger, 490 A.2d 474 (Pa. Commw. Ct. 1985).
10. 450 U.S. 248 (1981).

the court held that a white male "must prove by a preponderance of the evidence that [he] applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."[11] Where applicants included a black male, a black female, and several white females (in addition to the white male plaintiff), the circumstances did not warrant such an inference.

Typical of several controversies[12] where plaintiffs established *prima facie* cases of race discrimination, but were unable to rebut the proffered nondiscriminatory reasons for the adverse action, is a case of alleged race and sex discrimination.[13] A black female was among six finalists for a principalship; all other finalists were white males. Even though a white male was selected, the court found substantial evidence that the selection procedures were fair and that the man chosen for the position had been ranked higher on objective job criteria. (The court took note of the fact that the two black females on the selection committee favored the person who was hired.) Although the court was concerned about the lack of blacks and females in high administrative positions, it stated that this fact was not "decisive of the question of whether this plaintiff [had] been the victim of intentional discrimination."[14]

In four cases, federal appellate courts determined that district court findings of no purposeful race discrimination were not 'clearly erroneous."[15] Citing *Anderson v. City of Bessemer*,[16] the appellate courts found that they were obligated to give deference to district courts' findings of fact. Quoting *Anderson*, an appellate court said that "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of

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11. Farrell, 490 A.2d at 479, *quoting id.* at 253.

12. Love v. Alamance County Bd. of Educ., 757 F.2d 1504 (4th Cir. 1985) (promoted white males were more qualified than black female teacher); Lujan v. Franklin County Bd. of Educ., 766 F.2d 917 (6th Cir. 1985) (excellent coaching record and enthusiasm sustained finding of nondiscrimination when a white male was hired instead of a black male); Torrence v. Oxford Mun. School Dist., 615 F. Supp. 321 (N.D. Miss. 1985) (evidence of unsatisfactory performance supported discharge of black high school band director); Love v. Special School Dist., 606 F. Supp. 1320 (E.D. Mo. 1985) (failure to promote black teaching assistant to teaching position based on assistant's failure to meet objective job criteria).

13. Love v. Alabama Inst., 613 F. Supp. 436 (N.D. Ala. 1984).

14. *Id.* at 439.

15. Simmons v. Camden County Bd. of Educ., 757 F.2d 1187 (11th Cir. 1985); Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985); Rogers v. Masem, 774 F.2d 328 (8th Cir. 1985); McDaniel v. Temple Indep. School Dist., 770 F.2d 1340 (5th Cir. 1985).

16. 105 S. Ct. 1504 (1985). *See also* Fed.R.Civ.P. 52(a).

fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."[17] It is unlikely, therefore, that discrimination claims that are unsuccessful at trial will be reversed on appeal, for other than legal reasons.

The final case in this subsection is illustrative of the relatively rare claim of "reverse discrimination." In a large city school district, white teachers alleged that layoffs made pursuant to a negotiated agreement protecting the jobs of recently-hired minority teachers violated title VII and deprived the white teachers of equal protection under the Constitution.[18] Holding that race-conscious plans were not per se violations of these provisions, the court then considered the two allegations separately. Because a government body determined that hiring discrimination existed in the past and because the plan did not "unnecessarily trammel the interests of the white employees"[19] (i.e., it was a temporary provision, it did not require the replacement of white teachers by newly-hired black teachers, it did not absolutely prevent advancement by whites, etc.), the court determined that title VII was not violated. Likewise, the no-minority-layoff provision did not violate the equal protection clause. It served "the substantial and important interest of remedying the effects of discrimination" because it preserved the district's recent gains in minority hiring. If the provision had not been used, a quarter of the district's black teachers would have been laid off. With regard to the interests of the white teachers, the court pointed out that the lay-off provision did not stigmatize laid-off white teachers nor require that quality be ignored and, most importantly, it was voluntarily agreed to by the teachers union.

Religion

In a case involving alleged discrimination with respect to compensation, terms, conditions, or privileges of employment under title VII, a federal appellate court found that plaintiff had established a *prima facie* case of discrimination based on religion.[20] The case was remanded for a determination of whether a policy permitting three paid leave days for religious reasons, but not allowing additional personal leave days to be used for religious purposes, violated the federal

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17. Rogers v. Masem, 774 F.2d 328, 332 (citations omitted).
18. Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985).
19. *Id.* at 805, *citing* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).
20. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985).

statute. The court said that the title VII obligation to accommodate religion (unless such accommodation causes undue hardship) would require an employer to prefer the employee's accommodation proposal, if reasonable, to that of the employer.

Sex

In the 1985 cases reviewed here, females generally were unsuccessful in attempts to prove sex discrimination. Where school district policy denied extended leaves of absence to males and females alike, it was determined that a denial of preresignation seniority credit to a female who, for reasons of pregnancy and child-rearing, had resigned and been rehired twice, was not discriminatory.[21] In addition to unsuccessful claims based on race as well as sex,[22] females also were unsuccessful in three cases where they failed to prove that employers' reasons for adverse employment decisions were pretextual.[23] A case which illustrates the difficulty of proving discrimination concerned an elementary school instructional media director who was unsuccessful in her bid for the nearly identical job at the district's junior-senior high school.[24] Even though the court found that it was "uncontroverted that objectively [she] was the better qualified," selection of a male junior high language arts instructor, who was a strong disciplinarian, was upheld because employers are not "required to hire the best objectively qualified person. . . . So long as discrimination is not the motive behind the selection, even a poor choice should not be judicially rejected."[25]

Plaintiffs were successful in two New York cases where state-level administrative determinations of discrimination were found to be supported by substantial evidence;[26] compensatory damages of $5,000 were allowed in each case for mental anguish. In another case, admin-

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21. Daly v. Three Village Cent. School Dist., 486 N.Y.S.2d 286 (N.Y. App. Div. 1985).

22. Love v. Alamance County Bd. of Educ., 757 F.2d 1504 (4th Cir. 1985); McDaniel v. Temple Indep. School Dist., 770 F.2d 1340 (5th Cir. 1985); Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985); Love v. Alabama Inst., 613 F. Supp. 436 (N.D. Ala. 1985).

23. Record v. Mill Neck Manor Lutheran School, 611 F. Supp. 905 (E.D.N.Y. 1985); Board of Educ. v. Human Rights Comm'n, 481 N.E.2d 994 (Ill. App. Ct. 1985); Shapiro v. Community School Dist., 490 N.Y.S.2d 590 (N.Y. App. Div. 1985).

24. Board of Educ. v. Human Rights Comm'n, 481 N.E.2d 994 (Ill. App. Ct. 1985).

25. *Id.* at 997.

26. Board of Educ. v. McCall, 485 N.Y.S.2d 357 (N.Y. App. Div 1985); Board of Educ. v. State Div. of Human Rights, 486 N.Y.S.2d 469 (N.Y. App. Div. 1985).

istrative determinations of discrimination and retaliatory discharge were deemed relevant to a section 1983 civil rights claim.[27] And in two cases arising out of the same fact pattern, a school district policy of coupling teaching positions with football coaching responsibilities was held to have a discriminatory effect that was not justified by business necessity;[28] in addition, a female plaintiff received over $100,000 in back pay and "front pay" until afforded a full-time teaching position with the district.[29]

National Origin

Title VII, which prohibits discrimination based on national origin but not alienage (which is therefore relegated to constitutional protection), was the subject of two national origin cases reported in 1985. In the first, an elementary school librarian of Asian origin was not rehired because young children had difficulty understanding her; additionally, the superintendent's recommendation that she be appointed to a position in the junior high school was rejected by the board.[30] Because difficulty in communicating was a "feigned contention" *vis a vis* the junior high school position, the plaintiff was ordered reinstated. In the second, defendant school district's motion to dismiss was denied when a federal district court held (citing federal administrative determinations) that discrimination against an employee because of the employee's *association* with people of Hispanic national origin is prohibited by title VII.[31]

Age

Applying title VII standards to the Age Discrimination in Employment Act (ADEA)[32] (and a similar state statute), a New Jersey court held that a negotiated salary schedule, which had an incidental negative impact on older workers, did not violate federal or state law in the absence of intentional discrimination.[33] Also unsuccessful were

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27. McClure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985).
28. Civil Rights Div. v. Amphitheater Unified School Dist. No. 10, 693 P.2d 342 (Ariz. Ct. App. 1983).
29. Civil Rights Div. v. Superior Court, 706 P.2d 745 (Ariz. App. 1985).
30. Mandhare v. W.S. LaFargue Elementary School, 605 F. Supp. 238 (E.D. La. 1985).
31. Reiter v. Center Consol. School Dist., 618 F. Supp. 1458 (D. Colo. 1985).
32. 29 U.S.C. § 623(a).
33. Giammario v. Trenton Bd. of Educ., 497 A.2d 199 (N.J. Super. Ct. App. Div. 1985).

complaints on behalf of a teacher and bus driver against forced retirement.[34]

Handicap

Three cases reported in 1985 alleged discrimination against a custodian and two bus drivers under state law.[35] In addition, two cases alleged discrimination under section 504 of the Rehabilitation Act of 1973.[36] In the first section 504 case, a visually handicapped applicant for a position as a school librarian was unable to prove that she was an "otherwise qualified" handicapped individual or that she was denied employment solely because of her handicap.[37] An Eleventh Circuit case was remanded for consideration of whether a long-time teacher who was susceptible to tuberculosis was "otherwise qualified" or could reasonably be accommodated.[38] Rejecting the lower court's summary finding of no discrimination, the appellate court held (1) that the school district was subject to section 504 by virtue of its receipt of federal impact aid, (2) that a person who either has or has had a contagious disease is "handicapped" under federal law, and (3) that a "careful and informed weighing" of the factual issues of legitimate physical qualification and potential accommodation was required.

SUBSTANTIVE CONSTITUTIONAL RIGHTS

Cases reviewed in this section concern freedom of speech, association, and religion; the right to privacy; and substantive due process, where the allegation is that some state policy or action is arbitrary, capricious, or unfair rather than a violation of procedural regularity (procedural due process). As in prior years, free speech cases predominate.

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34. Equal Employment Opportunity Comm'n v. Fox Point-Bayside School Dist., 772 F.2d 1294 (7th Cir. 1985) (forced retirement at age 65 protected by a delay provision in an amendment to the AEDA); Ten Hoeve v. Board of Educ., 489 N.Y.S.2d 59 (N.Y. 1985) (amendment of state law to allow bona fide age qualification was applicable to case).

35. Lamarre v. Granville Cent. School, 484 N.Y.S. 2d 236 (N.Y. App. Div. 1985) (inability to climb ladder and lift objects precluded finding of discrimination); State Div. of Human Rights v. Leroy Cent. School Dist., 485 N.Y.S.2d 907 (N.Y. App. Div. 1985) (requiremnt of daily hormone medication did not reasonably preclude operation of bus); Giampa v. Commmonweatlh, 492 A.2d 504 (Pa. Commw. Ct. 1985) (state hearing standard for bus drivers not discriminatory and not violative of due process).

36. 29 U.S.C. § 794.

37. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

38. Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985).

Speech

Of three cases concerning a teacher's right to freedom of speech in curriculum matters, a teacher was successful in only one. A federal appeals court held that a teacher's right to academic freedom was violated when he was fired after public controversy arose surrounding his teaching of a unit on sexual reproduction.[39] Although the citizen who initiated the controversy was protected from liability by the first amendment freedom of petition provision, school officials were held liable for over $300,000 in damages because the book used by the teacher had been approved by the board, the course films had been used for years, and the principal had approved the teaching methods. In another case, however, where a teacher used a supplemental book in the homosexual rights unit of a course without obtaining the superintendent's approval as required by district policy, the teacher's dismissal was upheld.[40] Even thought the policy was not generally enforced, it was effective in this case because of a memo to the teacher from the principal specifically stating that it would be enforced with respect to the homosexual rights unit. The court clarified that the authority to choose instructional materials lies with the board. In the third case, a teacher was denied declaratory and injunctive relief when he claimed that his school's cancellation of a proposed tolerance day that included a lesbian speaker violated his right to freedom of speech.[41] Although the court said that the teacher had no first amendment right to control curriculum options, it also noted that legitimate concerns about disruption stemming from numerous phone calls, several bomb threats, etc., justified cancelling the proposed program.

Teachers also were unsuccessful in the majority of cases where they put forth free speech claims unrelated to curriculum concerns. A district that prohibited voluntary religious meetings of school employees, on school grounds but before classes began, did not violate the employees' free speech rights because the district had not created a limited public forum for employee speech activities.[42] In another case, a principal's dismissal for sexual remarks that interfered with his leadership capabilities did not deny his freedom of speech.[43] In an additional five cases, teachers were unable to demonstrate that their

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39. Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985).

40. Fisher v. Fairbanks N. Star Borough School Dist., 704 P2d 213 (Alaska 1985).

41. Solmitz v. Maine School Admin. Dist. No. 59, 495 A.2d 812 (Me. 1985).

42. May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985).

43. Rabon v. Bryan County Bd. of Educ., 326 F.2d 577 (Ga. Ct. App. 1985).

speech was a matter of public concern rather than private grievance;[44] and in two cases where courts found legitimate free speech activity, adverse employment decisions nevertheless were upheld.[45]

Illustrative of the latter type of case is a situation where a teacher spoke out regarding teacher assignments, student course registration procedures, and hiring for joint coaching-academic positions.[46] Citing *Pickering v. Board of Education* and *Connick v. Myers*,[47] the court noted that speech must concern matters of public importance in order to be protected activity; the speech must be a substantial or motivating factor in any adverse action, according to *Mt. Healthy City School District Board of Education v. Doyle*;[48] and adverse actions may still be legitimate if they would have occurred in the absence of the protected speech-related activity, according to *Givhan v. Western Lines Consolidated School District*.[49] Since the teacher's speech was only "tangentially related to matters of public concern," the court had no need to proceed with the three-part test.

Among the few cases where employees' free speech claims were successful was a situation where dismissal proceedings against a tenured teacher were enjoined because the teacher had spoken out about politically motivated transfers, a major topic of concern among several hundred citizens.[50] Another teacher was protected from retaliation where he chose to air nonpublic concerns about teacher assignment and evaluation directly to the school board despite a policy that teachers should communicate with the board through the superinten-

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44. Day v. South Park Indep. School Dist., 768 F.2d 696 (5th Cir. 1985) (disagreement with principal's negative evaluation of teacher not protected speech); Roberts v. Van Buren Pub. Schools, 773 F.2d 949 (8th Cir. 1985) (controversy concerning handling of parental complaints not a matter of public concern); Ferrara v. Mills, 596 F. Supp. 1069 (S.D. Fla. 1984) (administrative disagreements not of sufficient public concern); Stevenson v. Lower Marion County School Dist. No. 3, 327 S.E.2d 656 (S.C. 1985) accusation that superintendent incited student disturbances was personal matter); Heywood v. Thompson School Dist. R2-J, 703 P2d 1308 (Colo. Ct. App. 1985) (confrontations with principal were related to professional responsibilities unique to teacher).

45. Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985) (protest against school play a matter of public concern but also educationally disruptive); Board of Trustees v. Gates, 461 So. 2d 730 (Miss. 1984) (teacher insubordination supported dismissal despite legitimate free speech activity).

46. Ferrara v. Mills, 596 F. Supp. 1069 (S.D. Fla. 1984).

47. 391 U.S. 563 (1968); 461 U.S. 138 (1983).

48. 429 U.S. 274 (1977).

49. 439 U.S. 410 (1979).

50. Wichert v. Walter, 606 F. Supp. 1516 (D.N.J. 1985). *See also* Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985) (allegations of retaliation against teacher who protested cut-backs in reading program were supported by evidence); Morrison v. Salida School Dist., 701 P2d 101 (Colo. Ct. App. 1984) (backpay and reinstatement affirmed where conclusive case of nonrenewal for excessive outspokenness fully litigated and not appealed).

dent.[51] Retaliation against employees whose speech is protected can be costly as evidenced by punitive damages of $65,000 that were assessed against a superintendent and a principal;[52] although, in another case, compensatory damages of $514,333 were held excessive where retaliatory measures short of dismissal were proven.[53] And in a final case, summary judgment against a teacher was reversed where a free speech claim raised disputed facts that were not appropriate for summary resolution.[54]

Association

Employees in three cases failed to prove that bias against their union activities was a motivating factor in subsequent discharges;[55] another case was remanded for a jury determination on the issue of motivation.[56] In a successful suit, teachers obtained declaratory and injunctive relief that revoked retaliatory transfers and protected their associational and speech rights in connection with rival union activities.[57]

Religion

In a case where employees alleged a violation of their right to freedom of religion (as well as speech and association), a school district successfully defended its policy of disallowing employee prayer meetings on school grounds.[58] Applying the tripartite establishment clause test from *Lemon v. Kurtzman*,[59] the court determined that the policy had a secular purpose, that it neither advanced nor inhibited religion, and that it would avoid excessive state-church entanglement by making unnecessary the "comprehensive and continuing supervision" of meetings to assure nonparticipation by students. The court

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51. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).
52. Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985).
53. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).
54. Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985).
55. Heywood v. Thompson School Dist. R2-J, 703 P.2d 1308 (Colo. Ct. App. 1985); Byrnes v. Mecosta-Osceola Intermediate School Dist., 367 N.W.2d 831 (Mich. Ct. App. 1983); Buchheit v. Hamilton City Bd. of Educ., 473 N.E.2d 61 (Ohio Ct. App. 1984).
56. Roberts v. Van Buren Pub. Schools, 773 F.2d 949 (8th Cir. 1985).
57. Missouri Nat'l Educ. Ass'n v. New Madrid County R-1 Enlarged School Dist., 606 F. Supp. 25 (E.D. Mo. 1984).
58. May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985).
59. 403 U.S. 602, 612-13 (1971).

was particularly concerned that allowing the meetings in the "sensitive atmosphere of an elementary school" might give the appearance of state support for religion. Although making no explicit determination that the policy burdened free exercise rights, the court said that establishment clause principles created a compelling state interest in maintaining the policy.

Privacy

A federal court of appeals reversed and remanded a directed verdict against a teacher because of substantial evidence suggesting that the teacher's divorce was the reason for her nonrenewal.[60] Reviewing a number of Supreme Court cases, including *Carey v. Population Services International*,[61] the court determined that decisions related to marital status are protected by the constitutional right to privacy. Evidence in favor of the teacher included testimony by a principal and a school board member that the superintendent had told them his decision not to rehire the plaintiff was based on her pending divorce.

Substantive Due Process

Violations of substantive due process often are said to arise when state actions are arbitrary, capricious, or unfair in substance rather then lacking in procedural regularity; or when actions or policies violate a nonexplicit liberty right. Substantive due process was not denied in a case where the state's auditory proficiency standard for bus drivers was not "too sweeping,"[62] nor in another case where a custodian's resignation was not coerced.[63] In the latter case, because school officials believed that an alleged theft of money from a copying machine could be proved, a choice between resignation and probable dismissal was not made under duress in violation of due process. In a third case, although the court did not explicitly discuss due process, it found that the dismissal of a white cafeteria manager (who worked in a predominately black school) for enrolling her son in a private, white school, violated her "constitutionally protected interest in the education of her son."

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60. Littlejohn v. Rose, 768 F.2d 765 (6th Cir. 1985).
61. 431 U.S. 678 (1971).
62. Giampa v. Commonwealth, 492 A.2d 504 (Pa. Commw. Ct. 1985).
63. People *ex rel.* Schoepf v. Board of Educ., 606 F. Supp. 385 (N.D. Ill. 1985).

PROCEDURAL DUE PROCESS

The due process clause of the fourteenth amendment prohibits the state from denying to "any person . . . life, liberty, or property, without due process of law." In order to be entitled to procedural due process, which usually includes notice and some type of hearing, an employee must first establish that a "liberty" or "property" interest is being infringed by government actions or policy; threatened deprivations of "life" are not relevant in the employment context.

In 1985's leading case on due process, *Cleveland Board of Education v. Loudermill*,[64] the Supreme Court made clear that "the 'root requirement' of the [d]ue [p]rocess [c]lause" entails giving an individual "an opportunity for a hearing *before* he is deprived of any significant property interest."[65] Although in emergency situations, employees may be suspended with pay pending a hearing, the general rule is that prior "notice and an opportunity to respond" are "essential requirements of due process."[66] Because state law mandated a full post-termination evidentiary hearing, the Court sanctioned an attenuated pretermination hearing in the *Loudermill* case and noted that "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[67] The Court implied that absent provisions for an extensive post-termination hearing, more formal requirements would be necessary prior to dismissal.

In a case decided three days after *Loudermill*, a federal district court in New York held that where a teacher was given a statutory right to obtain a "similar position" upon abolition of a former position, a property right was created, requiring at least a preliminary hearing before discharge to assess disputed issues of fact.[68] Unless at the time of discharge it could be said as a matter of law that the positions were dissimilar, a summary pretermination hearing would be required, followed by a more elaborate hearing at a later time. The school board's motion to dismiss was denied in this case because a major factual dispute existed: whether the position of high school dean had been abolished and a new position of high school administrative

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64. 105 S. Ct. 1487 (1985).

65. *Id.* at 1493, *quoting* Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis in the original).

66. *Id.* at 1495. *See also* Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985) (postdeprivation hearing legitimate only where predeprivation hearing "impracticable" or "impossible").

67. *Id.*

68. DeSimone v. Board of Educ., 604 F. Supp. 1180 (E.D.N.Y. 1985).

assistant created, or whether the first position merely had been renamed rather than abolished.

Liberty and Property Interests

Among the cases where liberty and property interests were judicially noted,[69] was a case rejecting a teacher's asserted "liberty right" to regain a guidance position (and thus pursue his chosen occupation) by seeking decertification in science.[70] No liberty right was implicated because the teacher was free to seek a guidance job elsewhere. The court noted that to the extent the teacher asserted a right to the particular guidance position (a property right), such right was negated by the district's authority to transfer teachers within their areas of certification. Also among unsuccessful plaintiffs was a probationary employee who had no "claim of entitlement" to reemployment; and a superintendent who, while relieved of his duties, was not denied a property right because he continued to receive full salary and benefits.[71]

Illustrating the maxim derived from *Board of Regents v. Roth*,[72] that damage to reputation (a liberty interest) must be coupled with a loss of employment opportunity in order to trigger due process, is a case where a teacher was dismissed for unconstitutional reasons without being allowed a "fair opportunity" for defense. The court held that the board's actions violated the teacher's property interests and imposed a "stigma" that "foreclosed a definite range of employment opportunities."[73]

Illustrating another *Roth* maxim—that property rights are not based on the Constitution but rather derive from state or local law or policy—are four cases that also demonstrate the wide variety of avail-

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69. *See*, Rogers v. Masem, 774 F.2d 328 (8th Cir. 1985) (probationary teacher's [property] right to a hearing created by state law); Payne v. Ballard, 761 F.2d 491 (8th Cir. 1985) (past practice does not create property interest in absence of contract); Franceski v. Plaquemines Parish School Bd., 772 F.2d 197 (5th Cir. 1985) (tenured status a protected property right); Zimmerman v. Board of Educ., 597 F. Supp. 72 (D. Conn. 1984) (local provision or mutual understanding inconsistent with state law does not give rise to property interest); Ferdinand v. Hamilton Local Bd. of Educ., 478 N.E.2d 835 (Ohio Ct. App. 1984) (school lunch supervisor's continuing contract created a vested right); California School Employees Ass'n v. Compton Unified School Dist., 211 Cal. Rptr. 653 (Cal. Ct. App. 1985) (state law gave employees "permanent status" property right despite local rule to the contrary); Gardner v. School Dist. No. 55, 700 P2d 56 (Idaho 1985) (superintendent without contract had no property right).

70. Audet v. Board of Regents, 606 F. Supp. 423 (D.R.I. 1985).

71. Eureka County School Dist. Bd. of Trustees v. Holbo, 705 P.2d 640 (Nev. 1985); Royster v. Board of Trustees, 774 F.2d 618 (4th Cir. 1985).

72. 408 U.S. 565 (1972).

73. Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985).

able property rights. That property rights can consist of something less than a right to employment *per se* is shown by cases finding state- or locally-created property rights (1) to particular positions, (2) to "similar" positions upon abolition of current job-slots, (3) to placement and retention on a mandatory eligibility list for teacher employment, and (4) to local predemotion rights in addition to those mandated by statute.[74]

Aspects of Notice

In order to comport with the Constitution's procedural due process requirement, it is necessary that those against whom adverse employment decisions are contemplated must receive actual notice of the charges against them.[75] In addition, the notice must be sufficiently detailed to enable the preparation of a defense.[76] Adequacy of notice was demonstrated in a case where a school bus driver was fully informed of charges against her, despite the fact that she was notified only immediately before her termination hearing that she might be represented by an attorney.[77] A teacher also was given adequate notice of cause for dismissal when teaching deficiencies that were outlined in two prior evaluations were attached to the notice of proposed dismissal.[78] In a case where the court held the initial notice impermissibly vague, it nevertheless concluded that an explanation of charges at an informal pretermination hearing—coupled with the failure to request more detail, time, and a formal hearing—was sufficient to afford due process.[79]

Although a terminated tenured principal was given adequate notice of improperly attempting to purchase a home computer with school funds, he did not receive adequate notice of other charges that were relied on in the dismissal proceedings.[80] Analogously, where dismissal charges surrounding alleged sexual misconduct were not

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74. Sweeney v. Special School Dist. No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985); DeSimone v. Board of Educ., 612 F. Supp. 1568 (E.D.N.Y. 1985); Stana v. School Dist., 775 F.2d 122 (3d Cir. 1985); Jones v. Palm Springs Unified School Dist., 216 Cal. Rptr. 75 (Cal. Ct. App. 1985).

75. *See, e.g.*, Okeson v. Tolley School Dist. No. 25, 760 F.2d 864 (8th Cir. 1985) (neither actual notice nor waiver of notice was proved).

76. *See, e.g.*, Saxby v. Bibb County Bd. of Educ., 327 S.E.2d 494 (Ga. Ct. App. 1985) (written notice must detail charges in order that error might be detected).

77. Rodgers v. Norfolk School Bd., 755 F.2d 59 (4th Cir. 1985).

78. Hanlon v. Board of Educ., 695 S.W.2d 930 (Mo. Ct. App. 1985).

79. Strange v. School Bd., 471 So. 2d 90 (Fla. Dist. Ct. App. 1985).

80. Benton v. Board of Educ., 361 N.W.2d 515 (Neb. 1985).

proved, subsequent dismissal on charges not specified in the notice could not be upheld.[81]

Aspects of Hearing

Where a teacher initially waived a board hearing in favor of arbitration, one 1985 case held that due process was not denied by a board that failed to grant the teacher's subsequent request for a hearing;[82] another teacher's request for a hearing was denied when a trial-type hearing before an impartial panel was held and a full factual account was given to the board.[83]

In addition to the above cases, there were several instances where the procedural propriety of various aspects of the hearing process itself were challenged. While the judiciary approved trial-like procedural protections in many cases, it generally resisted employees' attempts to require procedures completely analogous to those mandated in judicial proceedings. It was rare for the judiciary to hold hearing procedures inadequate as a matter of federal constitutional law.

Hearing procedures were found to be adequate for due process purposes where an employee was not allowed to cross-examine but was informed of the identities and accusations of emotionally disturbed children who had witnessed the employee's alleged knife fight.[84] In other cases, due process was held not to require discovery of documents and the substance of witnesses' testimony, written procedural rules, the presence of witnesses not shown by the defense to be material, and the exclusion of a witness' testimony about statements made prior to two sessions of hypnosis.[85] It also was not improper to employ the regular school district attorney as a hearing examiner nor to ignore potentially exculpatory polygraph results.[86]

In a case invalidating hearing procedures as a matter of federal constitutional law, it was held that due process requires written findings of fact and relevant evidence so that parties are assured that a decision has been made on the record as a whole rather than on the

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81. Saxby v. Bibb County Bd. of Educ., 327 S.E.2d 494 (Ga. Ct. App. 1985).

82. Scotchlas v. Board of School Directors, 496 A.2d 916 (Pa. Commw. Ct. 1985).

83. Pagano v. Board of Educ., 492 A.2d 197 (Conn. App. Ct. 1985).

84. Rodgers v. Norfolk School Bd., 755 F.2d 59 (4th Cir. 1985).

85. Hanlon v. Board of Educ., 695 S.W.2d 930 (Mo. Ct. App. 1985); Cope v. Board of Educ., 495 A.2d 718 (Conn. App. Ct. 1985); Jeter v. Alabama State Tenure Comm'n, 473 So. 2d 513 (Ala. Civ. App. 1985); Mondragon v. Poudre School Dist. R-1, 696 P.2d 831 (Colo. Ct. App. 1984).

86. Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985); Donnelly v. Carmel Cent. School Dist., 486 N.Y.S.2d 309 (N.Y. App. Div. 1985).

basis of "extralegal considerations."[87] Other cases finding procedural problems generally referred exclusively to violations of state statutory procedures.[88] That not every violation of contract or state statute amounts to a due process violation, is illustrated by a case holding that notice and an opportunity to be heard satisfied federal constitutional requirements even though procedures may have violated state law.[89]

DISMISSAL, NONRENEWAL, AND DISCIPLINE

Questions of dismissal, nonrenewal, and discipline are governed by a variety of state statutes, local school board policies, and local contract provisions. Absent a colorable claim that an employee's constitutional rights have been violated, dismissal of tenured teachers, as well as those under term contracts, is governed largely by state statutes. These statutes often provide for dismissal based on charges of insubordination, unprofessional conduct, unfitness, wilful neglect of duty, immorality, incompetence, and "other good cause"; statutes also generally prescribe appropriate procedures for dismissal. Judicial review is limited to an assessment of procedural sufficiency and the substantiality of the evidence upon which administrative determinations have been based. Initial determinations are not reversed unless they are determined to be arbitrary or capricious.

Because nonrenewal decisions usually do not involve constitutional considerations, any substantive and procedural protections for nonrenewed employees must be derived from state or local law, policy, or practice. From the cases reviewed in this section, it appears that there is a trend to provide procedural protections in nonrenewal cases even though not required by the Constitution.

Insubordination

An equal number of insubordination cases were proved against teachers as disproved, and an additional case against a secretary was remanded.[90] Insubordination was shown when teachers continued to use physical discipline against students, refused to accept a transfer

87. Smith v. Board of Educ., 484 N.Y.S.2d 602 (N.Y. App. Div. 1985).

88. *See, e.g.*, Spurlock v. Board of Trustees, 699 P2d 270 (Wyo. 1985).

89. Franceski v. Plaquemines Parish School Bd., 772 F.2d 197 (5th Cir. 1985).

90. Oregon School Employees Ass'n, Chapter 115 v. Pendleton School Dist., 699 P2d 1155 (Or. Ct. App. 1985) (remanded for consideration of all of head secretary's insubordinate acts to see if they amounted to "flagrant insubordination").

and perform staff duties, and failed to timely submit lesson plans and maintain adequate and complete student folders.[91] Illustrative of cases where insubordination was not proven was a Pennsylvania case where teachers' isolated actions of corporal punishment of students, while in violation of board policy, were not intemperate, cruel, or willfully and persistently in violation of school laws.[92]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

There were very few cases where employees were successful in repudiating charges of unprofessional conduct, unfitness, or willful neglect of duty. In one case it was held that a teacher did not abandon her position; in another, unauthorized corporal punishment was held to be a remediable teaching deficiency; and, in a third, a teacher's guilty plea to possession of marijuana could not be used against her in a disciplinary hearing because of a state statute protecting first time offenders.[93]

Illustrative of ten cases where employees lost are situations where there existed sexual harassment of staff and students by a school counselor, physical abuse of emotionally disturbed students, the use of vulgar and profane language, failure to report rape and child abuse, and unnecessary use of force against students.[94] Less serious but sufficient charges included abusing a sick leave policy, refusing to prepare and submit teaching goals and objectives, persistent tardiness, improper record keeping, and unsatisfactory classroom presentation and control of students.[95]

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91. Simmons v. Vancouver School Dist. No. 37, 704 P2d 648 (Wash. Ct. App. 1985); Adlerstein v. Board of Educ., 485 N.Y.S.2d 1 (1984); Clarke v. Board of Educ., 482 N.Y.S.2d 80 (N.Y. App. Div. 1984).

92. Belasco v. Board of Pub. Educ., 486 A.2d 538 (Pa. Commw. Ct. 1985). Other insubordination cases were Bourland v. Commission on Professional Competence, 219 Cal. Rptr. 906 (Cal. Ct. App. 1985) (teacher's refusal to write performance objectives was not equivalent to persistent refusal to obey laws or regulation); and Schiffer v. Board of Educ., 491 N.Y.S.2d 826 (N.Y. App. Div. 1985) (refusal to attend psychiatric sessions without union representative did not equal insubordination where teacher had right to take representative).

93. Ciccarelli v. Board of Educ., 486 N.Y.S.2d 578 (N.Y. App. Div. 1985); Mott v. Endicott School Dist. No. 308, 695 P2d 1010 (Wash. Ct. App. 1985); Tate v. Board of Educ., 485 A.2d 688 (Md. Ct. Spec. App. 1985).

94. Downie v. Independent School Dist. No. 141, 367 N.W.2d 913 (Minn. Ct. App. 1985); Pisculli v. Board of Educ., 492 N.Y.S.2d 807 (N.Y. App. Div. 1985); Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985); Bellevue Pub. School Dist. No. 405 v. Benson, 707 P2d 137 (Wash. Ct. App. 1985); *In re* Doyle, 493 A.2d 54 (N.J. Super. Ct. App. Div. 1985).

95. Ward v. Board of Educ., 496 A.2d 1352 (Pa. Commw. Ct. 1985); Wiley v.

Immorality

Twice as many allegations of immorality against teachers were proved as were not proved, with charges ranging from making false statements[96] to having sexual relations with a student.[97] Other teachers were dismissed for publicly engaging in sexual intercourse, for using sexually suggestive language with students and seeking dates with them, for sexual advances toward a student, and for theft.[98]

In many of these types of cases it is necessary to show not only that the acts were committed (e.g., that the "theft" was proven),[99] but that the behavior was encompassed within the meaning of a statutorily sufficient cause for dismissal (e.g., that a "theft" was a "crime of moral turpitude"). Examples of behavior that was insufficient to prove immorality occurred in two cases in 1985. Neither a male teacher who was seen in the company of a fourteen-year-old female student, nor a male counselor whose conduct in counseling a fifth grade girl included hugging and touching her, were shown to have engaged in immoral conduct.[100]

Incompetence

Nearly all of the twelve incompetence cases had to do with failure to control students[101] or unsatisfactory classroom performance.[102] Of three miscellaneous cases, one concerned a principal who was termi-

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Richland Parish School Bd., 476 So. 2d 439 (La. Ct. App. 1985); Wilson v. Commonwealth, 488 A.2d 664 (Pa. Commw. Ct. 1985); Strange v. School Bd., 471 So. 2d 90 (Fla. Dist. Ct. App. 1985); Governing Bd. v. Commission of Professional Competence, 217 Cal. Rptr. 457 (Cal. Ct. App. 1985).

96. Blog v. McKeesport Area School Dist., 484 A.2d 198 (Pa. Commw. Ct. 1984).

97. Mondragon v. Poudre School Dist. R-1, 696 P.2d 831 (Colo. Ct. App. 1984).

98. Ross v. Springfield School Dist. No. 19, 691 P.2d 509 (Or. Ct. App. 1984); Gardner v. Commission on Professional Competence, 210 Cal. Rptr. 795 (Cal. Ct. App. 1985); Jeter v. Alabama State Tenure Comm'n, 473 So. 2d 513 (Ala. Civ. App. 1985); Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034 (Alaska 1984).

99. *See, e.g.*, Bey v. Board of Educ., 488 A.2d 89 (Pa. Commw. Ct. 1985) (theft not proven by substantial evidence).

100. Saxby v. Bibb County Bd. of Educ., 327 S.E.2d 494 (Ga. Ct. App. 1985); Board of Educ., v. Sickley, 479 N.E.2d 1142 (Ill. App. Ct. 1985).

101. Board of Educ. v. Wolff, 361 N.W.2d 750 (Mich. Ct. App. 1984); Hamburg v. North Penn School Dist., 484 A.2d 867 (Pa. Commw. Ct. 1984); Crump v. Durham County Bd. of Educ., 327 S.E.2d 599 (N.C. Ct. App. 1985).

102. Cope v. Board of Educ., 495 A.2d 718 (Conn. App. Ct. 1985); *In re* Gaetjens, 485 A.2d 1057 (N.H. 1984); Eshom v. Board of Educ., 364 N.W.2d 7 (Neb. 1985); Hanlon v. Board of Educ., 695 S.W.2d 930 (Mo. Ct. App. 1985); Dunnigan v. Ambach, 484 N.Y.S.2d 373 (N.Y. App. Div. 1985).

nated for sexual harassment of a job applicant and a former teacher; another dealt with a tenured teacher who was dismissed because of alcoholism; and the last concerned an ineffective nonrenewal where a school board policy (created pursuant to state statute) listed "incompetence" as a legitimate reason for nonrenewal, but did not cover "community feeling of incompetence."[103] There were no cases reported where employees successfully defended against charges of incompetence.

Compliance with School Board Policies and State Statutes

In the process of making and implementing an adverse employment decision, the necessity for and the adequacy of compliance with various state and local mandates must be considered. Cases reviewed in this subsection concern the disciplinary authority's effectuation of dismissal, nonrenewal, and other adverse employment decisions (e.g., reprimand, unsatisfactory rating, demotion, transfer, failure to promote, and suspension). Where an adverse action is not disciplinary in nature (e.g., when based on illness), procedural protections that might otherwise be available often are not required;[104] the same is usually true of a simple nonrenewal.

There were sixteen cases in 1985 dealing with the application of various local or state policies to dismissal situations. Pretermination rights of a school superintendent and an at-will custodian were judicially preserved where these entitlements were created by local board policy;[105] and another case was remanded to determine if a board's delegation of authority to dismiss bus drivers was properly delimited.[106] Statutory notice requirements were complied with where a teacher was given notice and informed of her right to ask for an open session.[107] In another case, a legally sufficient January dismissal could not be made retroactive to April 1st, but did provide sufficient prior

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103. Phillips v. Plaquemines Parish School Bd., 465 So. 2d 53 (La. Ct. App. 1985); Christy v. Board of Educ., 694 S.W.2d 280 (Mo. Ct. App. 1985); Seifert v. Lingleville Indep. School Dist., 692 S.W.2d 461 (Tex. 1985).

104. *See, e.g.*, Trotter v. Los Angeles County Bd. of Educ., 213 Cal. Rptr. 841 (Cal. Ct. App. 1985) (medical layoff not disciplinary, so no hearing required per statute).

105. Jones v. Palm Springs Unified School Dist., 216 Cal. Rptr. 75 (Cal. Ct. App. 1985); Pavadore v. School Comm., 473 N.E.2d 205 (Mass. App. Ct. 1985).

106. Jacobs v. Fremont Re-1 School Dist., 697 P.2d 414 (Colo. Ct. App. 1984).

107. State v. VanLare, 370 N.W.2d 271 (Wis. Ct. App. 1985).

notice for the ensuing year.[108] Ten additional cases dealt with a variety of state statutory mandates.[109]

Illustrating the consequences that flow from inadequate attention to state mandates is a case where a letter of termination was ineffective where it was not given at the time of the attempted dismissal or prior thereto.[110] Another dismissal was invalidated where it resulted from a teacher's refusal to accept a transfer to a position for which he was not certified;[111] such a transfer would have been illegal under state law.

Seven cases dealt with the application of state or local mandates to nonrenewal situations, with three holding, respectively, that a nonrenewal was statutorily ineffective because it was based on the submission of a grievance, that the board substantially complied with state-mandated procedural requirements, and that the state had no authority to review nonrenewal decisions.[112] In the other cases, notice of nonrenewal was held to comply with state law or local policy.[113]

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108. Boyle v. Board of Trustees, 707 P.2d 1135 (Nev. 1985).

109. Babitzke v. Silverton Union High School No. 7J, 695 P.2d 93 (Or. Ct. App. 1985) (state board had authority to invalidate dismissal where resignation from coaching duties was not a "total resignation" amounting to a consent to dismiss); School Comm. v. Teachers' Retirement Bd., 471 N.E.2d 61 (Mass. 1984) (statute precluded retirement board from reviewing teacher dismissals that were not arbitrary or irrational); Mullins v. Kiser, 331 S.E.2d 494 (W. Va. 1985) (teacher not subject to statute providing for dismissal of "public officials"); Connell v. Board of Educ., 483 N.Y.S.2d 504 (N.Y. App. Div. 1984) (neither lack of formal appointment nor federal funding of position precluded application of statutory dismissal rights); Schachter v. Tomaselli, 481 N.Y.S.2d 725 (N.Y. App. Div. 1984) (judicial review of alleged procedural errors must await final administrative determination); Schuck v. Board of Educ., 490 N.Y.S.2d 565 (N.Y. App. Div. 1985) (state statute did not give central school district employee pretermination rights, though city school district employees had such rights); Wagenblast v. Crook County School Dist., 707 P.2d 69 (Or. Ct. App. 1985) (state fair dismissal law not applicable to noncertified teacher's dismissal); Spurlock v. Board of Trustees, 699 P.2d 270 (Wyo. 1985) (discharge from principalship substantively and procedurally sufficient, though insufficient to affect status as teacher); Allegheny Intermediate Unit v. Jarvis, 490 A.2d 959 (Pa. Commw. Ct. 1985) (dismissal for refusal to accept a transfer for which teacher not certified was an illegal dismissal); Glover v. School Bd., 462 So. 2d 116 (Fla. Dist. Ct. App. 1985) (no attorney fees provided under state statute unless dismissal action "devoid of merit").

110. Sidney N. Collier Memorial Vocational-Technical School v. Caulfield, 460 So. 2d 54 (La. Ct. App. 1984).

111. Allegheny Intermediate Unit v. Jarvis, 490 A.2d 959 (Pa. Commw. Ct. 1985)

112. Marshall County Cent. Educ. Ass'n v. Independent School Dist. No. 441, 363 N.W.2d 126 (Minn. Ct. App. 1985); Neyland v. Board of Educ., 487 A.2d 181 (Conn. 1985); York v. Board of School Comm'rs, 460 So. 2d 857 (Ala. 1984).

113. Prichard v. Board of Educ., 705 P.2d 473 (Ariz. Ct. App. 1985) (no second notice of nonrenewal required where superintendent's notice to teacher adopted by board three days before deadline); Martinez v. Anchorage School Dist., 699 P.2d 330 (Alaska 1985) (notice timely when picked up on day registered letter would have ar-

Of thirteen cases concerning other adverse employment actions, two dealt with reprimands,[114] one with an unsatisfactory rating,[115] three with demotions,[116] two with transfers,[117] one with a failure to consider for promotion,[118] and three with suspensions.[119]

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate the elimination of professional positions. The legality of invoking reduction-in-force (RIF) procedures, the selection of employees to be terminated or laid-off, the realignment of remaining personnel, and call-back rights are governed by state and local law; employees in these situations generally do not have the "legitimate claim of entitlement" to their positions that would allow constitutional

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rived); Green Forest Pub. Schools v. Herrington, 696 S.W.2d 714 (Ark. 1985) (nonrenewal hearing did not substitute for prior written notice requirement); Hein v. Board of Educ., 698 P.2d 388 (Kan. Ct. App. 1985) (insufficient notice was harmless error where teacher was able to exercise right to hearing); Seifert v. Lingleville Indep. School Dist., 692 S.W.2d 461 (Tex. 1985).

114. Tomaka v. Evans-Brant Cent. School Dist., 486 N.Y.S.2d 546 (N.Y. App. Div. 1985) (written admonition for insubordinate action required no formal hearing); Brown v. Red River Parish School Bd., 469 So. 2d 1110 (La. Ct. App. 1985) (reprimand and probation entitled plaintiff to review under teacher removal statute).

115. Williams v. Board of Educ., 481 N.Y.S.2d 737 (N.Y. App. Div. 1984) (procedural adequacy precluded new hearing on unsatisfactory rating).

116. Daugherty v. Hunt, 694 S.W.2d 719 (Ky. Ct. App. 1985) (illegal demotion effected by inadequate notice of salary reduction); Vielle v. Reorganized School Dist. No. R-1, 689 S.W.2d 72 (Mo. Ct. App. 1985) (unlawful demotion effected by freezing salary); Swanson v. Board of Educ., 481 N.E.2d 1248 (Ill. App. Ct. 1985) (reclassification from principal to teacher required only that employee be heard in a public forum, not full evidentiary hearing).

117. Alabama State Tenure Comm'n v. Phenix City Bd. of Educ., 467 So. 2d 263 (Ala. Civ. App. 1985) (principal's transfer upheld where it served reasonable administrative function and was not for personal/political reasons); Holland v. Board of Educ., 327 S.E.2d 155 (W. Va. 1985) (transfer for prior misconduct not permitted unless state board evaluation policy followed).

118. Bush v. State Bd. of Educ., 327 S.E.2d 826 (Ga. Ct. App. 1985) (black, female employee of state education department granted relief when white male employee promoted on noncompetitive basis in violation of board policy).

119. Tucker v. Board of Educ., 492 A.2d 839 (Conn. App. Ct. 1985) (state law gave no right to appeal three-year suspension for insubordination); Finley v. Independent School Dist., 359 N.W.2d 749 (Minn. Ct. App. 1985) (unrequested leave invalid for procedural irregularities); Martin v. School Comm. of Natick, 472 N.E.2d 231 (Mass. 1984) (proper notice given for five-day suspension); Rike v. Commonwealth, 494 A.2d 1388 (Pa. 1985) (judicial appeal of disciplinary suspension proper; suspension could be effected by majority vote of board); Smith v. Board of Educ., 493 N.Y.S.2d 114 (1985) (subsequent certification did not render prior suspensions unlawful).

due process to be invoked. Cases resulting from RIF which raised constitutional issues (such as due process or discrimination) are dealt with in the first three sections of this chapter.

Necessity for Reduction-in-force

Program reorganization and resulting layoffs must be necessary and not pretextual and must comply with statutorily approved reasons. Three cases illustrate these principles: a one-to-nineteen teacher-student layoff ratio was held reasonable and necessary;[120] a district was made to demonstrate the necessity of a layoff where the employee alleged that his discharge was influenced by dissatisfaction with his performance;[121] and reinstatement was ordered where layoffs were not approved by the state superintendent.[122]

Elimination of Position

Procedural protections vary from state to state, with most states requiring no hearing (as a matter of federal or state law) when positions are eliminated for good faith economic or educational reasons;[123] a few states require notice and a hearing.[124] Blanket notice to all administrators regarding their possible reassignment to teaching has been held statutorily sufficient, and actual notice was effective where an employee received board minutes and was present when his position was abolished.[125]

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120. Bochner v. Providence School Comm., 490 A.2d 37 (R.I. 1985).

121. Short v. Nevada Joint Union High School Dist., 210 Cal. Rptr. 297 (Cal. Ct. App. 1985).

122. Rosen v. Montgomery County Intermediate Unit No. 23, 495 A.2d 217 (Pa. Commw. Ct. 1985).

123. *See, e.g.*, Martin v. School Comm. of Natick, 480 N.E.2d 625 (Mass. 1985) (termination due to declining enrollments necessitates no hearing per statute, federal due process, or contract); Koppi v. Board of Control, 479 N.E.2d 36 (Ill. App. Ct. 1985) (RIF negates teacher's claim of property interest); Roberts v. Beecher Community School Dist., 372 N.W.2d 328 (Mich. Ct. App. 1985) (procedural protections not required for economic layoffs, which are inherently not arbitrary or capricious); Breslin v. School Comm. of Quincy, 478 N.E.2d 149 (Mass. App. Ct. 1985) (neither federal nor state due process required when positions eliminated for educational reasons); Petett v. Board of Educ., 684 S.W.2d 7 (Ky. App. Ct. 1985) (transfer for financial reasons did not violate due process); Wessely v. Carrolton School Dist., 362 N.W.2d 731 (Mich. App. Ct. 1984) (procedural safeguards inapplicable to fiscally necessitated layoffs).

124. *See, e.g.*, Ferdinand v. Hamilton Local Bd. of Educ., 478 N.E.2d 835 (Ohio Ct. App. 1984).

125. Tucker v. Roach, 210 Cal. Rptr. 295 (Cal. Ct. App. 1985); Smith v. Dorak-III School Dist., 682 S.W.2d 182 (Mo. Ct. App. 1984).

Selection of Employee

Apart from questions of reassignment, which are dealt with in the next subsection, most of the 1985 selection cases were of limited applicability.[126] One case, however, suggested a policy issue of some importance: whether layoffs will be governed by strict seniority or whether educational need will be considered. In a Pennsylvania case, it was held that a state statute required layoffs to be effected on a strict seniority basis, despite educational arguments that teachers with middle school experience were needed more than those with elementary experience.[127]

Realignment/Reassignment

Statutes, policies, and collective bargaining agreements governing the realignment/reassignment of professional personnel vary substantially from state to state and sometimes from district to district. Nevertheless, tenure status, seniority, and areas of certification usually are relevant factors. Tenured teachers are preferred over nontenured teachers; those with more years of credited service in a state, district, or position are favored over those with fewer years; and certification is usually necessary to "bump" someone in another discipline or at another rank (when such cross-area bumping is permitted at all). To the extent that considerations of a purely educational nature have not been factored into the overall realignment scheme, they are sometimes given explicit legal status. However, just as some states

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126. Duluth Fed'n of Teachers v. Independent School Dist., 361 N.W.2d 834 (Minn. 1985) (statute authorizing seniority credit for total years of employment was applicable to administrator and could not be negated by collective bargaining agreement); Bristol Township School Dist. v. Karafin, 498 A.2d 824 (Pa. 1985) (involuntary suspension due to declining enrollment may not be effected until after teachers receive earned sabbatical leaves); Baker v. Independent School Dist., 691 P.2d 1223 (Idaho 1984) (no entitlement to remediation period before layoff for "other than unsatisfactory service"); Public Employees Fed'n v. Division of Classification and Compensation, 489 N.Y.S.2d 390 (N.Y. App. Div. 1985) (teachers voluntarily reclassified as developmental specialists did not retain right to reclassification as teachers for layoff purposes); Vettleson v. Special School Dist. No. 1, 361 N.W.2d 425 (Minn. Ct. App. 1985) (improper layoff resulted from actionable misrepresentation); Brandhorst v. Special School Dist. No. 1, 365 N.W.2d 383 (Minn. Ct. App. 1985) (layoffs for reasons other than licensure and seniority not permitted by statute); Berger v. Independent School Dist. No. 706, 362 N.W.2d 369 (Minn. Ct. App. 1985) (plaintiff's involuntary leave improper where second teacher placed in position had lost seniority rights because of extended leave).

127. Board of School Directors v. Ashby, 495 A.2d 665 (Pa. Commw. Ct. 1985). *See also* Brandhorst v. Special School Dist. No. 1, 365 N.W.2d 383 (Minn. Ct. App. 1985) (layoffs governed by licensure and seniority only).

make layoff decisions based on strict seniority, some also effect realignments without considering teacher competence.[128] State and local procedures for effecting realignments within a school or district will not necessarily apply when districts are consolidated or annexed.[129]

The propriety of particular realignment decisions depends on a variety of procedural and substantive factors that often have required additional information for resolution:[130] was the reassignment decision made in good faith;[131] did the school board obtain the teacher's consent to placement outside a major or minor field of study, as required by board policy; etc.?[132] Issues that have arisen when one teacher claims a right to bump another are whether the teacher has a right to bump, whether the teacher is in fact certified or qualified to bump, and whether the right to bump extends across department lines (i.e., whether it is a school-wide right).[133]

More complex questions arise when a teacher claims a right to have more than one teacher displaced (multiple bumping) in order to create a position vacancy the original teacher is qualified to fill. One case, for example, held that in the absence of statutory language calling for multiple reassignments, elementary teachers threatened with layoff had no right to demand that those elementary teachers qualified to teach at the high school level be allowed to bump less-senior high school teachers.[134] The permissibility of realignment between teaching and administrative areas varies, with vertical realignment sometimes proceeding only downward—from administrative ranks to teaching ranks.[135] On the other hand, several cases illustrate that lay-

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128. *In re* Cowden, 486 A.2d 1014 (Pa. Commw. Ct. 1984).

129. *See, e.g.*, Woodard v. Wabbaseka-Tucker Pub. School Dist., 689 S.W.2d 546 (Ark. 1985) (no statutory right to employment in new district to which home district annexed).

130. *See, e.g.*, State v. Board of Educ., 367 N.W.2d 461 (Minn. 1985); Fry v. Commonwealth, 485 A.2d 508 (Pa. Commw. Ct. 1984).

131. Pennell v. Board of Educ., 487 N.E.2d 445 (Ill. App. Ct. 1985) (bad faith reassignment cannot be used to defeat tenure rights).

132. Board of Educ. v. Dowling, 360 N.W.2d 315 (Mich. Ct. App. 1984) (mutual consent a valid qualification to reassignment outside major or minor field).

133. Rippe v. Board of Educ., 486 N.Y.S.2d 713 (N.Y. 1985) (right to bump extends only to teachers given probationary appointments after Aug. 1, 1975, and then only as to tenure areas created at that time); Blank v. Independent School Dist., 372 N.W.2d 386 (Minn. Ct. App. 1985) (administrators not covered by realignment agreement; teacher entitled to bump because "qualified" [licensed and experienced]); Hanlon v. Board of Educ., 474 N.E.2d 407 (Ill. App. Ct. 1985) (teacher failed to demonstrate qualification for position sought); Ruter v. Independent School Dist., 364 N.W.2d 823 (Minn. Ct. App. 1985) (school-wide bumping right upheld).

134. Gallison v. Bristol School Comm., 493 A.2d 164 (R.I. 1983).

135. Derry Township School Dist. v. Finnegan, 498 A.2d 474 (Pa. Commw. Ct. 1985) (multiple realignment across teaching and administrative ranks not required to

offs by seniority demand school-wide horizontal realignments across disciplines.[136]

Call-back Rights

Even though state statutes may provide for multiple realignment when layoffs are initially made, one case has held that this right does not extend to the call-back period.[137] In this case, state law provided preferential call-back rights for one calendar year from the beginning of the term following layoff, but only for positions that happened to become available.

An area of increasing litigation concerns the right of laid-off employees to be appointed to new positions that are, at times, similar to the positions the employees formerly held. Two Massachusetts cases held that a department head who was displaced by a good faith consolidation of departments had no right to be appointed head of the new department, and that junior high school principals had no right to be appointed principal of newly created middle schools.[138] In New York State, where state law gives a right to be appointed to newly created "similar position," the employee must be qualified for the new position;[139] and the position vacated must, in fact, be similar to the position sought.[140] A federal district court sitting in New York has held that these types of cases require a pretermination hearing to assess similarity.[141] Citing *Cleveland Board of Education v. Loudermill*,[142] the court said that plaintiff had been deprived of "the means of his livelihood" when the position of high school dean was replaced by a new administrative assistant position, and that such deprivation of property without a pretermination hearing was a violation of procedural due process.

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preserve the job of a tenured teacher seeking displacement of a temporary principal); Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 498 A.2d 102 (Conn. App. Ct. 1985) (for purposes of realignment, administrators have dual rights—those of administrator and teacher).

136. *See, e.g.*, Musorofiti v. Board of Educ., 485 N.Y.S.2d 572 (N.Y. App. Div. 1985); Beeman v. Board of Educ., 494 N.Y.S.2d 27 (N.Y. App. Div. 1985); Strand v. Special School Dist. No. 1, 361 N.W.2d 69 (Minn. Ct. App. 1984).

137. Hanlon v. Board of Educ., 474 N.E.2d 407 (Ill. App. Ct. 1985).

138. Caso v. School Comm. of Waltham, 483 N.E.2d 1115 (Mass. App. Ct. 1985); Breslin v. School Comm. of Quincy, 478 N.E.2d 149 (Mass. App. Ct. 1985).

139. Jester v. Board of Educ., 486 N.Y.S.2d 484 (N.Y. App. Div. 1985) (counselor not cerified as social worker); Schimmel v. Board of Educ., 490 N.Y.S.2d 64 (N.Y. App. Div. 1985) (drivers education teacher not certified in industrial arts).

140. *Id. See also* Shearod v. Board of Coop. Educ. Servs., 486 N.Y.S.2d 62 (N.Y. App. Div. 1985) (position involving teaching not similar to nonteaching position).

141. DeSimone v. Board of Educ., 612 F. Supp. 1568 (E.D.N.Y. 1985).

142. 105 S. Ct. 1487 (1985).

A few additional cases illustrate a miscellany of procedural and substantive issues related to call-back rights; two of these illustrate that a "vacancy" for recall purposes arises upon the resignation of a teacher, but not when the teacher is on an extended leave because of illness.[143]

CONTRACTUAL DISPUTES

Board Policies and Contract Stipulations

Contract disputes concerning an applicant or employee's right to hold a particular position are an ever-present part of employee litigation. In 1985, an administrator showed that a valid contract was formed when he was offered reemployment by letter and accepted by a hand-written memorandum, despite the failure to use a state-approved form.[144] Another employee successfully regained her position when a jury determined that abandonment of her bartending job was not made a condition precedent to her employment as a bus driver.[145]

Among employees who were unsuccessful in asserting locally-based claims to particular positions were a tenured teacher whose withdrawal of her resignation was ineffective because it impliedly had been accepted when a replacement was hired,[146] and employees who had no contractual relationship with the state, no contract right to renewal, and no right to allege breach of contract (because of prior waiver).[147]

With regard to other terms and conditions of employment, it was

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143. Tomiak v. Hamtramack School Dist., 360 N.W.2d 257 (Mich. Ct. App. 1984) (teacher who refused recall can be required to apply for a discretionary leave of absence); Daul v. Board of Educ., 482 N.Y.S.2d 265 (N.Y. 1984) (teaching "vacancy" created by resignation entitled most senior teacher on preferred eligibility list to appointment); Weidman v. Brandon School Dist., 371 N.W.2d 910 (Mich. Ct. App. 1985) (teacher's absence because of illness created no legal "vacancy" mandating the recall of laid-off tenured teacher).

144. Board of Educ. v. Jennings, 701 P2d 361 (N.M. 1985).

145. Wilkerson v. School Dist. No. 15, 700 P2d 617 (Mont. 1985).

146. Braught v. Board of Educ., 483 N.E.2d 623 (Ill. App. Ct. 1985). *But cf.* California Teachers Ass'n v. Board of Educ., 209 Cal. Rptr. 655 (Cal. Ct. App. 1985) (teacher's withdrawal of resignation effective in absence of board acceptance).

147. Pordum v. State, 492 N.Y.S.2d 204 (N.Y. App. Div. 1985) (no breach of contract where reinstatement was barred by state commissioner pending outcome of fitness hearing and teacher thus had no employment relationship with state); Gardner v. School Dist. No. 55, 700 P2d 56 (Idaho 1985) (nonrenewal did not breach contract because superintendent had no renewable contract right); Siler v. Turnbull, 693 P2d 1323 (Or. Ct. App. 1985) (by accepting head football coaching contract, teacher waived right to allege breach of oral contract to employment as athletic director).

held that a superintendent had lawful authority to modify a psychologist's job description despite the employee's attempt to condition his acceptance on a favorable job-description agreement negotiated between the superintendent and another psychologist.[148] Districts lost in four other cases, however, with one of these affirming a breach of contract where a board had adopted but not followed an evaluation policy applicable to probationary teachers subject to nonrenewal.[149]

Administrative Regulations and Statutory Provisions

Among cases reported in 1985, there were more contract disputes involving the interpretation and application of state statutes than local contract provisions, with the majority relating to the right to hold a particular position or to obtain particular wages. Of five miscellaneous terms and conditions of employment cases, one court held that a school district was not precluded by the continuing contract statute from modifying the supplemental contracts it awarded for extended duties,[150] and four courts held in favor of employees on various issues.[151] A total of six cases concerned the claimed right to hold a particular position. Two employees unsuccessfully claimed breach of contract when it was found that neither a probationary employee nor an at-will employee had statutory procedural rights;[152] and a teacher who moved to Massachusetts from Georgia pursuant to an oral agreement had no legal recourse when he was dismissed several weeks later.[153] In

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148. Jawa v. Board of Educ., 324 S.E.2d 161 (W. Va. 1984).

149. Belcher v. Jefferson County Bd. of Educ., 474 So. 2d 1063 (Ala. 1985). *See generally* Maddox v. St. Paul School Dist., 697 S.W.2d 130 (Ark. Ct. App. 1985) (ambiguity in contract construed against district); Pastor v. San Juan School Dist. No. 1, 699 P.2d 418 (Colo. Ct. App. 1985) (backpay ordered where leave covered by maternity policy, not leave-without-pay policy); Benavides Indep. School Dist. v. Guerra, 681 S.W.2d 246 (Tex. Civ. App. 1984) (validity of employee's unilateral change in written contract at issue).

150. Issaquah Educ. Ass'n v. Issaquah School Dist. 411, 706 P.2d 618 (Wash. 1985).

151. King v. Board of Educ., 486 A.2d 111 (Conn. 1985) (superintendent entitled to indemnification under statute protecting board employees when he was joined with the board as a defendant in action to nullify his resignation); Chandler v. Perry-Casa Pub. Schools Dist. No. 2, 690 S.W.2d 349 (Ark. 1985) (statutory authority to reassign negates legal injury); Wygant v. Victor Valley Joint Union High School Dist., 214 Cal. Rptr. 205 (Cal. Ct. App. 1985) (local salary policy inconsistent with statute requiring uniform compensation for equivalent years of training and experience); Lundberg v. Board of Educ., 487 N.Y.S.2d 306 (N.Y. Sup. Ct. 1985) (board had statutory authority to grant or deny teacher's leave request, not to modify it).

152. Eureka County School Dist. Bd. of Trustees v. Holbo, 705 P.2d 640 (Nev. 1985); Tyson v. Hess, 487 N.Y.S.2d 206 (N.Y. App. Div. 1985).

153. McAndrew v. School Comm., 480 N.E.2d 327 (Mass. App. Ct. 1985).

the latter case, the court declined to estop the school district from denying the contract because doing so would frustrate statutory requirements designed to protect the public interest. Another employee, while entitled to reappointment because of an ineffective nonrenewal, relinquished that right by rejecting a proffered contract that omitted his previous coaching responsibilities;[154] the school district did have the right to reassign him. And employees seeking reinstatement to their previous positions were successful in three cases where failure to abide by statutory provisions voided a transfer, nonrenewal, and dismissal, respectively.[155]

Seven cases were reported in 1985 concerning individual employee wage disputes. One teacher who did not fulfill her statutory obligation to return to teaching following a sabbatical had to repay money to the district.[156] Two other teachers' claims also failed.[157] More successful were the two teachers granted backpay because of statutory violations by their districts,[158] and other teachers who were entitled to irrevocable transfer-credit rights and to a 15% statutory cost-of-living increase applicable to their supplemental salary as well as their regular salary.[159]

TENURE

"Tenure" is a statutory right to continuing contract status. One who has tenure is entitled to procedural due process protection and has certain rights that can be defeated only "for cause" (e.g., incompetency, immorality). Noncertificated employees can acquire tenure in some states; administrators can acquire tenure in many states; and teachers and supervisors can acquire tenure in most states. There are only a few states where tenure as a teacher is defined by the length of

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154. Grounds v. Tolar Indep. School Dist., 694 S.W.2d 241 (Tex. Civ. App. 1985).

155. Lavender v. McDowell County Bd. of Educ., 327 S.E.2d 691 (W. Va. 1984); Brennan v. Vinton County Local School Dist. Bd. of Educ., 480 N.E.2d 476 (Ohio 1985); Wren v. McDowell County Bd. of Educ., 327 S.E.2d 464 (W. Va. 1985).

156. Walter v. North Hills School Dist., 487 A.2d 85 (Pa. Commw. Ct. 1985).

157. Arfin v. Ambach, 488 N.Y.S.2d 869 (N.Y. App. Div. 1985) (waiver of right to transfer credit and delay in action precluded recovery under state statute); Alabama State Tenure Comm'n v. Shelby County Bd. of Educ., 474 So. 2d 723 (Ala. Civ. App. 1985) (transfer with loss of salary did not equal "loss of status" precluded by state statute).

158. Jennings v. Dumas Pub. School Dist., 763 F.2d 28 (8th Cir. 1985) (teacher entitled to backpay where nonrenewal violated statutory notice provision); Kipp v. Juniata County School Dist., 487 A.2d 444 (Pa. Commw. Ct. 1985) (permanent professional employee entitled to backpay equal to statutory minimum).

159. Greenwich Cent. School Dist. v. Ambach, 484 N.Y.S.2d 339 (N.Y. App. Div. 1985); Childers v. Morgan County Bd. of Educ., 465 So. 2d 428 (Ala. Civ. App. 1985).

service in particular disciplines or areas of instruction.

Some state statutes provide that an employee can acquire tenure either as a teacher or administrator and maintain that status despite subsequent vertical transfers between administrative and teaching ranks. In other states where both administrators and teachers are granted tenure, employees may be required to serve an additional probationary period upon transferring to another rank. This is most often true, however, when a teacher is promoted to an administrative position; administrators are more likely to be considered tenured "teachers" when downward transfers are necessary. The transferability of tenure status from district to district within a state also is governed by state law.

Tenure Status

The acquisition of tenure, and rights pursuant thereto, depends on the interpretation of state law. Courts are often required to assess whether the employee has served in a defined status, under enumerated conditions, for the applicable probationary period—which in many states is three years. Questions of status and conditions vary greatly from state to state, but most states require that employees serve a probationary period that ranges from two to five years.

In cases reported in 1985, central office positions were held to be administrative and not subject to tenure as an instructor, teacher, or principal "in the public schools" of Alabama, and an Alabama coach was ineligible for tenure under the teacher tenure act because no certification was required for coaching, as it was for teaching.[160] Three different states found that neither long-term substitutes, temporary teachers, nor paraprofessionals were eligible for credit toward tenure;[161] and another state court found that certified county employees could not acquire tenure unless they were in teaching positions (in contrast to district-level administrative and nonteaching personnel who were permitted to acquire tenure).[162] In the only case where employees successfully asserted that their status was covered by the tenure statute, it was held that title I teachers were, in fact, "teaching staff members."[163] On the other hand, teachers whose positions were

160. Alabama State Tenure Comm'n v. Singleton, 475 So. 2d 185 (Ala. Civ. App. 1984); Bryan v. Alabama State Tenure Comm'n, 472 So. 2d 1052 (Ala. Civ. App. 1985).

161. Bochner v. Providence School Comm., 490 A.2d 37 (R.I. 1985); Campbell v. Board of Educ., 333 S.E.2d 507 (N.C. Ct. App. 1985); Cook v. Board of Educ., 375 N.W.2d 740 (Mich. Ct. App. 1984).

162. Neumarkel v. Allard, 209 Cal. Rptr. 616 (Cal. Ct. App. 1985).

163. Rutherford Educ. Ass'n v. Board of Educ., 489 A.2d 1148 (N.J. 1985).

financed by federal funds explicitly were not covered by another state's teacher tenure statute.[164]

Of three cases dealing with various conditions precedent to tenure status,[165] one held that an eight week maternity leave taken pursuant to statute did not disrupt the "continuity of service" required to gain tenure.[166] However, the court did not determine if it would be necessary for the teacher to teach an additional full year to satisfy the three-year probationary period, because the teacher had done so.

There were eight cases where employees questioned whether they had satisfied the statutory probation period; four were decided against the employees and four in favor. Illustrative of the first group is one case where a teacher was denied credit toward tenure where she did not teach the full semester, and another where teachers who were nonrenewed effective at the end of their probationary period were precluded from attaining tenure.[167] Illustrative of the second group is a Minnesota case holding that a state statute did not prescribe that "teachers" (instructors and principals) serve an additional probationary period upon their vertical or horizontal transfer to new positions.[168]

Tenure by Default or Acquiescence

Both competent and incompetent employees sometimes obtain

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164. Board of Educ. v. Savino, 494 A.2d 1258 (Del. Super. Ct. 1985).

165. The first two were Long v. LaFourche Parish School Bd., 460 So. 2d 651 (La. Ct. App. 1984) (tenure rights to higher salary accrued although employee served as principal for two years and assistant principal, at same salary, for a third year), and Ramsay v. Sierra Vista Unified School Dist., 697 P.2d 343 (Ariz. Ct. App. 1985) (although tenured teacher's contract was revoked per statute [in the absence of timely acceptance], when another contract was offered, teacher's tenure rights were preserved).

166. Solomon v. School Comm., 478 N.E.2d 137 (Mass. 1985).

167. Lifsan v. Board of Educ., 486 N.Y.S.2d 61 (N.Y. App. Div. 1985); Pookman v. School Dist., 483 A.2d 1371 (Pa. 1984). *See generally* Nessen v. Board of Educ., 491 A.2d 419 (Conn. App. Ct. 1985) (where probationary period consisted of three years of service under written contract, four years of such service interrupted by several years without a contract precluded the attainment of tenure); Kellerman v. Board of Educ., 367 N.W.2d 371 (Mich. Ct. App. 1985) (part-time teaching for 160 days for two school years was not equal to "two full school years").

168. Sweeney v. Special School Dist. No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985). *See generally* Wright v. Board of Educ., 491 A.2d 644 (N.J. 1985) (flexible tenure statute covering custodians did not preclude board from agreeing to tenure for all custodians after three years); Faison v. New Hanover County Bd. of Educ., 330 S.E.2d 511 (N.C. Ct. App. 1985) (statutory interpretation demonstrated that three-year term as supervisor was sufficient to protect employee from demotion); Breuhan v. Plymouth-Canton Community Schools, 359 N.W.2d 566 (Mich. Ct. App. 1984) (teacher who taught all but seven days of two-year period taught two "full school years").

tenure because of a district's oversight or negligence in following statutory procedures for securing or preventing the acquisition of tenure. For example, a teacher who had taught two years "without receiving notice of unsatisfactory performance," automatically achieved tenure at the end of the second year.[169] Likewise, an improper transfer of a principal during his third year was ineffective to deny tenure where tenure denial was only possible through the proper cancellation of the principal's contract.[170] In the last case, a district failed to give a probationary teacher, who was eligible for continuing appointment, written notice by a specified date of intent to require an additional year of probation.[171] The teacher acquired tenure by operation of law.

CERTIFICATION

Certification Standards

Only four cases dealing with certification standards were reported in 1985, and the latter three are more properly a question of standards for recertification. In the first case, a board of education was not estopped from removing a noncertified principal when his prior service as an administrative assistant was judged insufficient to meet supervisory and administrative certification requirements.[172]

In a New Mexico case, a former teacher who had been convicted of criminal sexual conduct with a child under thirteen met his burden of demonstrating rehabilitation for purposes of recertification.[173] In the absence of contrary evidence by the state, the favorable testimony of a clinical psychologist was held sufficient. On the other hand, the recertification of a school bus driver who underwent corrective heart surgery was denied on the basis of a statute precluding the qualification of those with a medical history of "coronary insufficiency."[174] The dissent argued that the corrected "coronary arterial obstruction" did not amount to a "coronary insufficiency" within the statute. Similarly, though a bus driver was found to be healthy, his license suspension was upheld where he had a history of myocardial infraction.[175]

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169. Breuhan v. Plymouth-Canton Community Schools, 359 N.W.2d 566 (Mich. Ct. App. 1984).

170. Debrow v. Alabama State Tenure Comm'n, 474 So. 2d 99 (Ala. Civ. App 1984).

171. State *ex rel.* Lee v. Bellefontaine City Bd. of Educ., 477 N.E.2d 1135 (Ohio 1985).

172. Morley v. Arricale, 482 N.Y.S.2d 483 (N.Y. App. Div. 1984).

173. Garcia v. State Bd. of Educ., 694 P.2d 1371 (N.M. Ct. App. 1984).

174. Commonwealth v. Miller, 492 A.2d 121 (Pa. Commw. Ct. 1985).

175. Commonwealth v. Johnson, 489 A.2d 960 (Pa. Commw. Ct. 1985).

Decertification, Revocation, or Suspension

In one case, a teacher's attempt to regain his guidance position by decertifying himself in math, general science, and vocational electronics was unsuccessful.[176] In preserving the state's right to transfer a teacher among his areas of specialization, the court held that the teacher's liberty right to pursue his chosen occupation of guidance counselor was not implicated because he was free to seek such a post elsewhere.

Of the three revocation cases, one Florida case held that a teacher whose certification had been permanently revoked had no right even to apply for recertification.[177] The case suggests why another Florida teacher attempted, unsuccessfully, to surrender his teaching certificate before it could be permanently revoked on charges of sexual misconduct with students.[178] In the final case, the revocation of a school superintendent's certification was upheld for his falsification of attendance, transportation, and school lunch records.[179]

176. Audet v. Board of Regents, 606 F. Supp. 423 (D.R.I. 1985).
177. Longenecker v. Turlington, 464 So. 2d 1249 (Fla. Dist. Ct. App. 1985).
178. Couch v. Turlington, 465 So. 2d 557 (Fla. Dist. Ct. App. 1985).
179. Balentine v. Arkansas State Bd. of Educ., 684 S.W.2d 246 (Ark. 1985).